

Openness in Government: The Open Meeting and Open Records Acts

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Purpose of the Open Meeting and Records Acts



***Transparency in Government
Government under the Microscope***

OUR GOALS

- ✓ Present the information in an organized-manner rather than just section-by-section.
- ✓ Create a user-friendly, go-to resource.
- ✓ Empower YOU to make the best decision.

IMPORTANT DISCLAIMERS

1. *Neither this presentation nor any answers we provide to your questions should be construed as legal advice. This is informational and educational.*

IMPORTANT DISCLAIMERS

2. **SURPRISE!** We're lawyers.

This presentation is communicating best practices aimed to prevent you from having any allegations of violations made against your public body or office and to keep you out of court. These best practices prepare the best defense for your public body or office.



The Open Meeting Act (OMA)

*25 O.S. 2021,
§§ 301 – 314*

*Yellow Book
Page 1*



OVERVIEW

- When does the OMA apply?
- To whom or what does it apply?
- What must be done to comply?
- Why should I comply?

PUBLIC PURPOSE OF OMA

- Encouraging citizens to know more about public bodies, governmental processes, and governmental problems (advance notice, agenda, and minutes).
- Creating space for citizens to come and watch government in action as the public body tackles the issues of the day (open meetings to the public at convenient times and places).

WHEN THE OMA APPLIES?

When a ***majority*** of a ***public body's*** members come together to ***conduct public business.***

PUBLIC BODY DEFINED

25 O.S. 2021, § 304(1), Yellow Book 2.

Municipal governing bodies

Boards of county commissioners

Boards of public and higher education

All boards, bureaus, commissions, agencies, trusteeships, authorities, councils, committees, and public trusts

Any committee or subcommittee of a public body

ELEMENTS OF PUBLIC BODY ANALYSIS

Supported by
public funds

Entrusted with
spending
public funds

Administration
of public
property

Actual or de-facto
decision-making
authority

EXEMPT PUBLIC ENTITIES

The Judiciary

State Legislature and legislators

Administrative staff of public bodies

Other entities, incl. Racing Stewards, Council on Judicial Complaints

Multi-disciplinary teams provided for under Title 10A of the Oklahoma Statutes for sole purpose of considering recommendations of team and deciding placement of a child

Board of Directors of Federally-qualified health center

Committees that are purely fact finding, informational, recommendatory, or advisory with no decision-making authority. *Andrews v. Indep. Sch. Dist. No. 29 of Cleveland Cnty.*, 1987 OK 40, 737 P.2d 929.

Private organizations that contract to provide goods or services to the public on behalf of a governmental agency and receive payment as reimbursement. 2002 OK AG 37.

BETWEEN THE CRACKS

- There are some public bodies that are weird:
 - Appear to fall under public body analysis;
 - A part of another branch, thus falling under exemption; but
 - Specific statute requires compliance with Open Meeting Act.
- **MUST FOLLOW THE ACT**
- If public body members do not comply, they open themselves up to liability.
- **REMEMBER:** If an entity has specific authority requiring it to follow the OMA, it must follow it.

QUESTION FROM SEN. RON SHARP

2020 OK AG 2

- Relevant to our presentation today, the Senator asked whether the OSSAA was subject to the OMA or ORA?
- OAG concluded that OSSAA was not subject to the OMA because of two reasons—
 - No evidence that OSSAA was supported by public funds. Defined support as “to pay the costs of; maintain,”
 - Based on this definition, our office has distinguished between—
 - Entity receiving public funds pursuant to legislative enactment or other government authorization for a public purpose, or
 - Entity simply paid in exchange for providing identifiable goods and services
 - OSSAA didn’t fit well on either side of this spectrum. Thus, the Office concluded that it more consistently in the latter.

MEETING DEFINED

Conduct of business of a public body by a majority of its members being personally together or, as authorized by Section 307.1 of this title, together pursuant to a videoconference. Meeting shall not include informal gatherings of a majority of the members of a public body when no business of the public body is discussed.

INFORMAL GATHERINGS

- Conferences
- Receptions
- Church Services
- Community Events
- Funerals

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION
Research Park, Oklahoma City

A G E N D A **SPECIAL MEETING**

Thursday, November 7, 2019 – 9:30 a.m.
655 Research Parkway,
Presbyterian Health Foundation Conference Center,
Oklahoma City
Chairman Joseph L. Parker, Jr., Presiding

1. **Reception for State Regents, State System Regents, Presidents and other guests prior to the State Regents Meeting.**

MAJORITY vs. QUORUM

- OMA default for quorum is a majority.
- A specific act or rule for a particular public body may determine that less than a majority of the public body is authorized to transact business on behalf of the public body. This may be referred to as a quorum. In any event, rely on the specific statute or rule over § 304(2) when determining if a meeting must comply with the OMA. [Unpublished Opinion 93-587](#).
- **LOOK FOR**: X members shall be authorized to transact business for the **[Public body]**.
- Ex-officio members can be included in your count. See 2009 OK AG 26.
- Your quorum **DOES NOT** decrease in light of a vacancy. See 1982 OK AG 165.

TEXTS, EMAILS, AND SOCIAL MEDIA

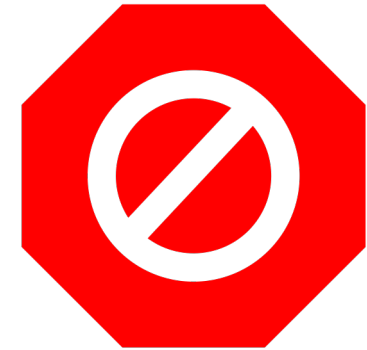
Dorothy sends an email to all fellow Committee Members about an upcoming business item related to the RFP

Sophia has an opinion and smashes replies all.

Confused, Rose also replies all to ask a question.

Having a past experience to share, Blanche hits reply all to weigh in.

A meeting has occurred, and the OMA is violated.



POST-MEETING LUNCH OR COFFEE



BEST PRACTICE: A majority of a public body's members should not attend lunch together.

Does the Open Meeting Act apply?

Public body comprising of Joey, Rachel, Phoebe, Chandler, Monica, and Ross has a properly noticed meeting in accordance with the Open Meeting Act.

The meeting adjourns at lunchtime. Rachel brought her signature trifle for everyone. Famished and scared of the trifle, Joey, Ross, Chandler, and Monica want to get burgers or grab something at the coffee shop.

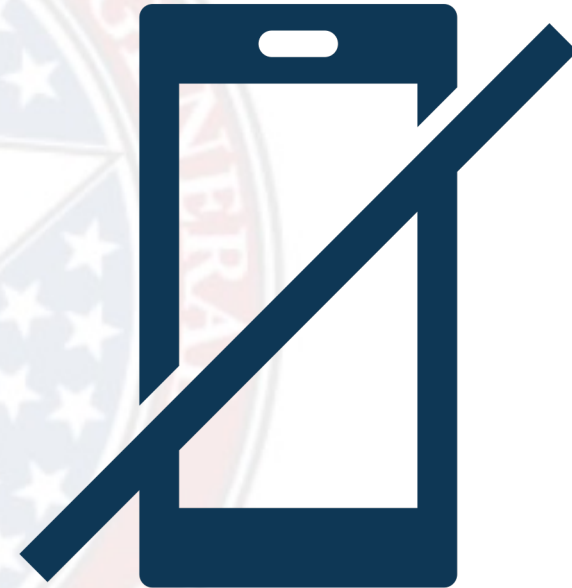
‘CONDUCTING PUBLIC BUSINESS’

- Ordinary meaning in harmony with the Act’s purpose.
- Includes the **entire** decision-making process, including presentation of information, deliberation, decision, or formal action.

In re Appeal of Order Declaring Annexation Dated June 28, 1978, 1981 OK CIV APP 57, 637 P.2d 1270; 1982 OK AG 212.

CIRCUMVENTING THE ACT

- Public body cannot use informal gatherings or electronic or telephonic communications among a majority of the members to decide any action or vote on any matter.
- Convenient **≠** Legal.



25 O.S. 2021, § 306, Yellow Book 5.

Question from Rep. Collin Walke

2020 OK AG 4

- Rep. Walke asked whether a minority of a public body members can meet outside of a public meeting consistent with the OMA.
- The short answer is that it depends.
- If the public body is doing so to willfully and purposefully circumvent the Act, a court might say that such a meeting, even among a minority, is a violation.
- **DO NOT—**
 - *Conduct polling, or*
 - *Hold discussions with the desired aim of reaching a consensus prior to a meeting.*
- Allowed to hold informational briefings where information is provided and received.
- **REMEMBER:** The purpose of the OMA is to facilitate public knowledge and awareness of governmental problems and processes.

MEETINGS



TYPES OF MEETINGS



REGULARLY
SCHEDULED
MEETINGS



SPECIAL
MEETINGS



EMERGENCY
MEETINGS



CONTINUED OR
RECONVENED
MEETINGS

CORE REQUIREMENTS



Provide Advance Notice



Post Agenda

ADVANCE NOTICE TO WHOM?

- State public bodies and governing boards of higher education: **Secretary of State.**
- County public bodies, boards of education, and public bodies under the auspices of a governing board of higher education: **County Clerk** of the county in which the body is principally located.
- Municipal public bodies: **Municipal Clerk.**

TIMES AND PLACES OF MEETINGS

- Specified times and places,
- Convenient to the public,
- Open to the public, and
- Must provide advance notice (agenda).

Rogers v. Excise Bd. of Greer Cnty.

1984 OK 95, 701 P.2d 754

- Excise Bd. scheduled meeting to be held a legal holiday.
- The meeting was held in a **locked** courthouse.
- Court held that this was a willful violation of the OMA. It demonstrated a blatant or deliberate disregard by those who know or should know, if not a willful and purposeful violation of the OMA.

TIMES AND PLACES

- Can you have your meeting on Black Friday?
Probably not.
- Can you have your meeting between Christmas Day and New Year's Eve?
Legally, yes. Practically, not a good idea.

REGULARLY SCHEDULED MEETINGS



- Advance Notice
 - All meetings for the upcoming calendar year must be sent to the appropriate record-keeping clerk by December 15 of the current year.
 - Time, date, and place.
- Posting the Agenda
 - 24 hours prior to the time of the meeting in *prominent public view* at location of meeting or the principal office of public body, or
 - May also upload to public body's website.*
 - Excludes Saturdays, Sundays, and public (legal) holidays.
- New business allowed to the extent that it meets the following:
If it is known about or could have reasonably been foreseen prior to the time of posting the notice and agenda for the meeting, then it is not new business. See 25 O.S. 2021, § 311(A)(10).

25 O.S. 2021, §§ 304(3) & 311(A)(1)-(10), Yellow Book 3 & 16-19.

REGULARLY SCHEDULED MEETINGS (cont'd)

- Changing the date, time, or place?
Notice must be given to the appropriate recordkeeping clerk no less than ten (10) days prior to the implementation of any such change.
- What does this mean?
A public body cannot change the time, date, or place of a regularly scheduled meeting if the meeting is set less than ten (10) days away.

A public body **may move up** a regularly scheduled meeting, but the meeting cannot be scheduled less than ten (10) days from the date that notice of the change is published.

BEST PRACTICE: Set a special meeting if the issue(s) is/are urgent and cancel the regularly scheduled meeting.

SPECIAL MEETINGS !

- Advance Notice
 - 48 hours prior to time of meeting.
 - Time, date, and place.
 - Excludes Saturdays, Sundays, and State holidays.
 - Must also send notice to those who have requested to receive notice of meeting.
- Posting the Agenda
 - 24 hours prior to the time of the meeting in *prominent public view* at location of meeting or the principal office of public body, or
 - Public Body **may elect** the agendas for special meetings to its website.
 - Excludes Saturdays, Sundays, and public (legal) holidays.
- New business **NOT** permitted.

25 O.S. 2021, § 311(A)(12), Yellow Book 3 & 20.

EMERGENCY MEETINGS



- Must first meet the definition of ‘emergency’, which is a “situation involving injury to persons or injury and damage to public or personal property or immediate financial loss ***when the time requirements for public notice of a special meeting would make such procedure impractical and increase the likelihood of injury or damage or immediate financial loss.***”
- Advance Notice
 - As much advance notice as is reasonable and possible under the circumstances existing, and
 - In person, telephonic, or electronic.
- Posting the Agenda
 - As much advance notice as is reasonable and possible under the circumstances existing.
- Must include nature of emergency and reasons for declaring such emergency meeting in written minutes for an emergency meeting.

25 O.S. §§ 304(5) and 311(A)(13), Yellow Book 4 & 13.

CONTINUED OR RECONVENED MEETINGS

- Give notice of such action that the original meeting, including—
 - Date,
 - Time, and
 - Place of continued meeting.
- Only matters appearing on the agenda for the meeting continued may be discussed on continuance or reconvening meeting.
- **BEST practice**: Post notice on website and with recordkeeping clerk. Also, post updated agenda with remaining items of business.

25 O.S. 2021, §§ 304(6) & 311(A)(11), Yellow Book 4 & 19-20.

MINUTES & RECORDING

- Must be written and taken by a designated person.
- Minutes are an **official summary** of the proceedings—
 - Must show who is present and absent, matters considered, and actions taken (**2012 OK AG 24**);
 - Shall be open for inspection, and
 - Shall reflect the manner and time of notice required under the OMA.
- Minutes must be taken in executive session. **Berry v. Bd. of Governors of Registered Dentists**, 1980 OK 45, 611 P.2d 628.
- State law does not require minutes to be approved.
- Recording the proceedings
 - Members of the public can record the meeting; however, they are not entitled to interfere with the conduct of the public meeting.

25 O.S. 2021, § 312, Yellow Book 22-24.

PUBLIC COMMENTS

- Public bodies are not required to allow an opportunity for the public to comment on matters or issues being considered by the public body, but it may allow for such comments.
- Public bodies may limit public comment to items set forth on the agenda, or it may allow for open comment.
- If a public body decides to include public comment in its meetings, the public body should consider adopting a policy, such as setting a time limit for each person providing public comments, setting a cut-off for when persons must sign up to participate in the public comments, and potentially limiting the comments to agenda items.
- An agenda item titled “Visitors Comments” or “Public Comments” is sufficient to meet the requirements under the OMA.
- **CAUTION:** Items for discussion on the agenda should not be discussed by the public body at this time. This is the public body’s opportunity to listen.

TAKING ACTION

- Votes of each member of a public body: must be publicly cast and recorded.
- May only take action on agenda items that indicate or provide for action to be taken.
- If the vote is either not publicly cast or not recorded, the action taken is invalid. ***Oldham v. Drummond Bd. of Educ.***, 1975 OK 147, 542 P.2d 1309.

25 O.S. 2021, § 305, Yellow Book 5.

VIDEOCONFERENCE & TELECONFERENCE

1. Not less than a quorum must be present at site of meeting.
2. All public body members must be audible and visible to one another.
3. Executive sessions are **NOT** allowed.
4. Notice and agenda must include the **locations** of the meeting; the videoconference sites (*i.e.*, location, address, and telephone number); and identity of members and from where they will appear.
5. Members of public bodies may only participate from the district or subdivision from which they are elected, appointed, or sworn to represent.
6. Materials shared must be immediately available “in the same form and manner” as shared with the public body.
7. Public must be allowed to participate and speak as allowed by rule or policy set by the public body at the videoconference site as permitted at the site of the meeting.
8. Each site and room must be open and accessible to the public.

EXECUTIVE SESSIONS



TWO *IMPORTANT* QUESTIONS

1. **Can I do it?**

Does it meet one of the bases, or is there some other legal authority?

2. **How do I do it legally?**

- a. Have I posted it on the agenda?*
- b. Have I cited to the specific basis for executive session?*
- c. Have I provided context as to what the public body will be discussing?*
- d. Has a majority of the public body present voted to enter executive session?*

BEFORE, DURING, AND AFTER

- A majority of the public body members present must vote in the affirmative to enter into executive session. 25 O.S. 2021, § 307(E)(2).
- Executive sessions are not authorized when a public body meets via videoconference. 25 O.S. 2021, § 307.1.
- Public vote to enter executive session.
- Cannot vote or poll in executive session.
- Public vote to exit out of executive session.

BEST PRACTICE: After exiting executive session, announce the following, “No votes were taken in executive session, and no items not listed on the agenda for discussion in executive session were discussed.”

EIGHT MOST COMMON BASES

Allowed ***only under certain circumstances and only those circumstances allowed under statute***, such as —

- Discussing employment, hiring, appointment, promotion, demotion, disciplining, resignation, or termination [§ 307(B)(1)];
- Discuss negotiations concerning employees and representatives of employee groups [§ 307(B)(2)];
- Discuss purchase or appraisal of real property [§ 307(B)(3)];
- Confidential communications between public body and attorney, the disclosure of which would impair the public body's ability to proceed in the public interest [§ 307(B)(4)];

EIGHT MOST COMMON BASES (cont'd)

- To hear evidence and discuss expulsion or suspension of a student when requested by the student involved or student's parent, attorney or legal guardian [§ 307(B)(5)];
- Discuss matters involving a specific handicapped child [§ 307(B)(6)];
- Discussing matter in which information is subject to confidentiality requirements under state or federal law [§ 307(B)(7)]; or
- Deliberations in an individual proceeding pursuant to the Administrative Procedures Act [§ 307(B)(8)].

CONSTRUING SECTION 307

- Cannot talk about a job opening in executive session. 2006 OK AG 17.
- Cannot discuss hiring independent contractors. 2005 OK AG 29.
- Must identify the unique position or person if holding executive session under §307(B)(1). 1997 OK AG 61.
- “Pending” under § 307(B)(4) includes an *anticipated or potential* claim, litigation, investigation, or action. 2005 OK AG 29.

So what? — You’re safe to rely on a litigation evidence hold or demand letter.

REAL ESTATE TRANSACTIONS

Only certain people allowed in executive session when the purchase or appraisal of real estate property is discussed. These people are—

- Public body members,
- Attorney for the public body, and
- Immediate staff of the public body.

Cannot invite landowners, real estate salesperson, broker, developer, or any other person who may profit directly or indirectly from proposed transaction being considered.

- **Exception**—these individuals are operating pursuant to an agreement to represent the public body.
- It boils down to 1 question—*Are these people duty-bound to represent the public body's best interests?*
 - Yes – They may come in.
 - No – They cannot come in.

SAMPLE AGENDA LANGUAGE # 1

[§ 307(B)(1)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(1), to discuss the **[hiring, termination, performance, or employment]** of **[Name of employee/Unique position]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION pursuant to 25 O.S. 2021, § 307(B)(1).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.

SAMPLE AGENDA LANGUAGE # 2

[§ 307(B)(1)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(1), to conduct interviews of **[Candidate A, Candidate B, Candidate C, etc.]** for the position of **[Unique position]**, and to discuss the hiring or appointment, including setting annual compensation, of any of the above-mentioned candidates,.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION pursuant to 25 O.S. 2021, § 307(B)(1).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.

SAMPLE AGENDA LANGUAGE [§ 307(B)(4)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(4), to discuss the **[case, litigation, claim, investigation]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION 25 O.S. 2021, § 307(B)(4).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.

Opinion of counsel: On the advice of counsel, disclosure of communications related to the above-referenced **[case, litigation, claim, investigation]** will seriously impair the ability of [Name of public body] to process **[case, litigation, claim, investigation]** in the public interest.

SAMPLE AGENDA LANGUAGE [§ 307(B)(7)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(7), to discuss **[matter]** where disclosure of information would violate confidentiality requirements of state or federal law, specifically **[Citation to state or federal law]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION 25 O.S. 2021, § 307(B)(7).
- c. Vote to exit Executive Session.

SAMPLE AGENDA LANGUAGE [§ 307(B)(8)]

Discussion and possible action to convene in Executive Session pursuant to 25 O.S. 2021, § 307(B)(8), to engage in deliberations or engage in intermediate decision in an individual proceeding pursuant to Article II of the Administrative Procedures Act concerning **[Case, Case No.]**.

- a. Vote to enter Executive Session.
- b. EXECUTIVE SESSION 25 O.S. 2021, § 307(B)(8).
- c. Vote to exit Executive Session.
- d. Possible action regarding item(s) discussed in Executive Session.

AGENDAS



WORDING THE AGENDA

- “Shall identify all items of business to be transacted by a public body at a meeting.”
- Must include any proposed executive session
- If executive session is proposed, public body must:
 - Contain sufficient information for public to know what the public body is going to discuss.
 - Identify items of business and purposes of executive session, and
 - State which provision under § 307 applies.

WORDING THE AGENDA (cont'd)

- Must be worded in plain language, directly stating the purpose of the meeting
- Language used should be—
 - Simple,
 - Direct, and
 - Comprehensible to a person of ordinary education and intelligence.

Andrews v. Indep. Sch. Dist. No. 29 of Cleveland Cnty., 1987 OK 40, 737 P.2d 929; ***Haworth Bd. of Educ. Of Indep. Sch. Dist. No. 1-6, McCurtain Cnty. v. Havens***, 1981 OK CIV APP 56, 637 P.2d 902.

AGENDA EXAMPLE #1

Wilson v. City of Tecumseh, 2008 OK CIV APP 84, 194 P.3d 140

- Public body provides sufficient notice to the recordkeeping clerk.
- Then, public body publishes the following agenda item for a proposed executive session:
- Proposed Executive Session pursuant to 25 O.S. §307(B)(1) to discuss the employment, hiring, and resignation of [Employee].
- Public body enters into executive session, discusses the above matter, votes to exit executive session, and then votes to award a bonus (equivalent of 6 months in salary) to the Employee.
- What's wrong here?

AGENDA EXAMPLE #2

Haworth Bd. of Educ. of Indep. Sch. Dist. No. 1-6, McCurtain Cnty. v. Havens, 1981
OK CIV APP 56, 637 P.2d 902

- Public body provides sufficient notice to the recordkeeping clerk.
- Then, public body publishes an agenda with the following language:
- Proposed Executive Session pursuant to 25 O.S. §307(B)(1) to discuss appointment of board member. Discussion of hiring administrator. Hiring principal. A second notice and agenda listed the items to be considered as:
 - Appoint new board member.
 - Interview a new administrator.
 - Hire principals.
- Public body enters into executive session, discusses the matters listed above, exits executive session, and then votes to hire and set a salary for a superintendent.
- What's wrong here?

F.O.P., Bratcher/Miner Mem'l Lodge, Lodge No. 122 v. City of Norman

2021 OK 20, 489 P.3d 20

- Norman City Council meets to take action on their operating budget on June 16, 2020.
- Agenda states that the Council can (1) adopt or (2) reject the budget.
- Agenda refers to FYE 2021 Budget Amendments 6-12-2020.
- City Council took up and adopted three amendments, reallocating funds away from Norman PD. The amendments were not attached as a part of the amendments attached to the agenda.
- Fraternal Order of Police sued, alleging a violation.

F.O.P., Bratcher/Miner Mem'l Lodge, Lodge No. 122 v. City of Norman (cont'd)

- The trial court found against the City of Norman, concluding that the City had violated the OMA and granted summary judgment.
- City of Norman appealed to the Supreme Court.
- The Oklahoma Supreme Court retained the appeal.
- It affirmed the District Court, finding that the City of Norman violated the OMA.
- Agenda was written to only allow adoption or rejection of the budget, not amendment.
- Court held the agenda to be deceptively vague and likely to mislead, thus making it a willful violation of the OMA.

BEST PRACTICES AFTER *F.O.P. v. NORMAN*

- Do not limit the agenda to just adoption or rejection; it is best to include “possible action.” On the agenda, you might consider listing what “possible action” means.
- Indicate or cite your supporting documents or attachments on the actual agenda.
- If sufficient time allows, list all amendments one by one under the item of business. If done this way, you may want to include language allowing members of the public body to make amendments during the meeting. State law or municipal charter or ordinance may require otherwise.
- **Remember:** the expression one thing excludes others.

WHY SHOULD I COMPLY?



VIOLATIONS OF THE ACT

CIVIL IMPLICATIONS

- Actions taken in willful violation are ***invalid***.
- Minutes of executive session will be made public when OMA is violated.
- ***Any person*** can bring civil action. Successful party is entitled to reasonable attorney fees.

CRIMINAL PENALTIES

- Any willful violation, if convicted, is a **misdemeanor**, and is punishable by:
 - Fine up to \$500,
 - One (1) year in the county jail, or
 - Both.

Remember *F.O.P. v. City of Norman*?

- Following its decision in April 2021, the Oklahoma Supreme Court granted FOP's motion for appeal-related attorney fees.
- In a July 2021 journal entry order, the City of Norman and FOP agreed to just less than \$40,000.00 in attorney fees subject to a post-judgment interest rate of 5.25%.

WILLFULNESS

“Willfulness does not require a showing of bad faith, malice, or wantonness, but rather, encompasses *conscious, purposeful violations of law¹ or blatant or deliberate disregard of the law²* by those who know, or should know . . . Notice of meetings of public bodies which are ***deceptively vague¹*** or *likely to **mislead²*** constitute a willful violation.”

Rogers v. Excise Bd. of Greer Cnty.,
1984 OK 95, 701 P.2d 754.



Bailey v. State ex rel. Bd. of Tests for Alcohol and Drug Influence

2022 OK 50, 510 P.3d 845

- Employee of public body had been emailing back and forth with Secretary of State's Office concerning rules and meeting. When sending out the advance notice of the meeting, he thought that he added the Secretary of State's Office to the email, but he didn't. Board proceeded to meeting where agenda was posted in accordance with the OMA, and it revoked several driver's licenses.
- **Summary:** Litigant challenging action taken by public body must show evidence of willfulness. Forgetting to send notice does not constitute willfulness to violate the Act.

STATUTORY CONSTRUCTION OF THE OMA

- Liberally construed to “further [Act’s] goals and in favor of public.” ***Matter of Order Declaring Annexation Dated June 28, 1978, Issued by Frazier***, 1981 OK CIV APP 57, 637 P.2d 1270.
- Strict compliance; cannot get away with “substantial compliance.” See ***State v. Patton***, 1992 OK CR 57, 837 P.2d 483.

CORRECTING AN INVALID ACTION

- ❑ Post advance notice
- ❑ Post agenda timely with accurately worded agenda item
- ❑ Take item up, re-vote, and record the decision

WRAPPING THINGS UP: OMA Takeaways



KEY OBJECTIVES

- **O**rganize your meeting: get what you want to talk about on the agenda and never rely on 'New Business'.
- **P**roceed as planned: don't deviate from the agenda.
- **E**mpower stakeholders and yourselves: meet at times and places convenient for you and others, and make materials available to public as required.
- **N**ever decide out of the public view: decisions must be made for all to hear (*publicly* cast and recorded).

LOOKING FORWARD at the OMA

September 22, 2022, Interim Study – Rep. Daniel Pae (Lawton), Rep. Andy Fugate (S. Oklahoma City), and Sen. Brent Howard (Altus).

- Likely going to see some legislation in the 2023 Regular Session.
- What will likely be addressed?
 - Permanent language for states of emergency or health emergencies,
 - More flexibility in videoconferencing but with guardrails,
 - Requiring greater accessibility to public body meeting materials, and
 - Refashioning requirements of the Act to bring it into the 21st Century.
- **Nothing has been introduced so far by a legislative member nor is it considered Oklahoma law.**
- View the interim study on the Oklahoma House website: <https://bit.ly/3LAvvND>

SECRETARY OF STATE'S OFFICE

- **Open Meeting Calendar:**

<https://www.sos.ok.gov/meetings/legacy/calendarOP.aspx>

- **Email meeting notices to:** meetingnotices@sos.ok.gov

- **Forms:**

- [Notice of Regularly Scheduled Meetings](#)
- [Notice of Special Meeting or Change to Regularly Scheduled Meeting](#)

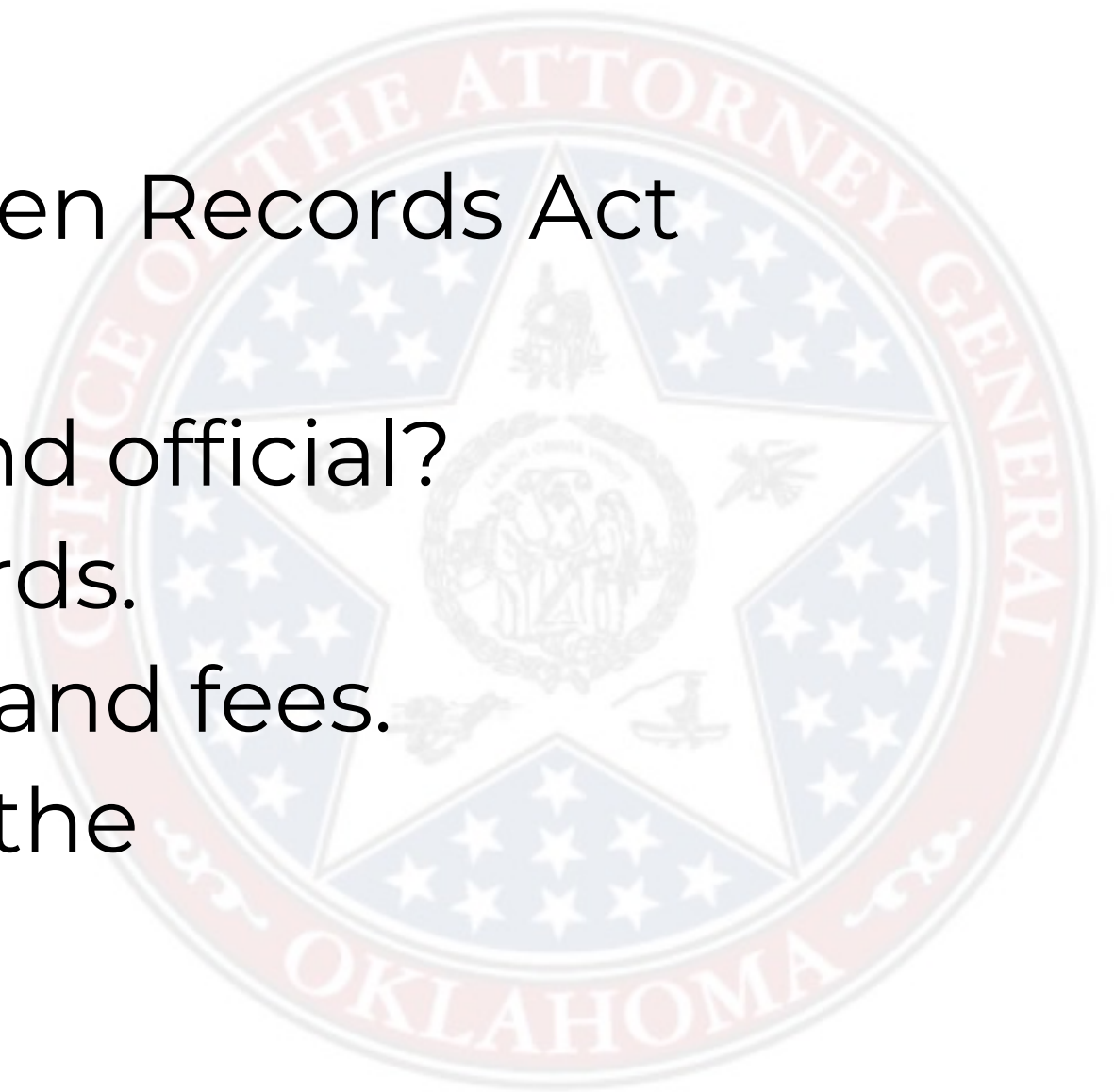
The Open Records Act (ORA)

*51 O.S. 2021,
§§ 24A.1 – 24A.33*

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OVERVIEW

- The purpose of the Open Records Act
- What is a record?
- What is public body and official?
- Confidentiality of records.
- Production of records and fees.
- Penalties for violating the Open Records Act.



PURPOSE OF THE ACT 51 O.S. 2021, § 24A.2

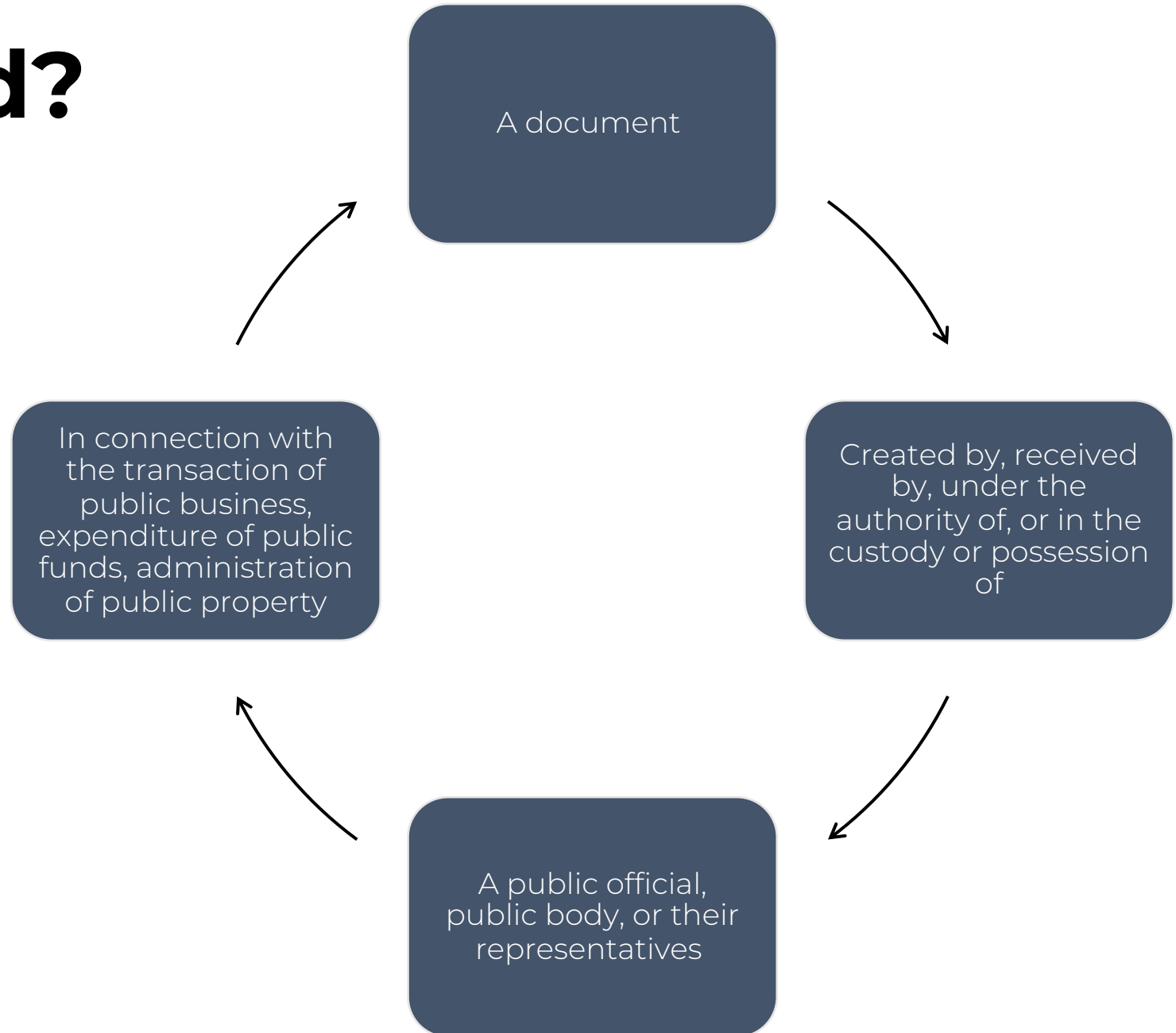
Oklahoma citizens have an “inherent right to know and be fully informed about their government . . . so they may efficiently and intelligently exercise their inherent political power.”

RECORDS



What is a record?

The Act defines a “record” quite broadly; it must only meet these four definitions.



What is a document?

- Books
- Papers
- Photographs
- Microfilm
- Certain data files
- Computer tape
- Disks
- Records
- Sound or Film Recordings
- Video recordings
- Emails
- Text messages.



Public Bodies and Public Officials

51 O.S. § 24A.3 (1)

Public officials: official
or employee of any
public body

Public bodies: any office,
municipality, or school
district, supported in
whole or in part with
public funds or
administering or
operating public property.
Excludes judges, justices,
Council on Judicial
Complaints, the
Legislature, or legislators.

Their representatives

What is a NOT a record?

- Computer software;
- *Nongovernmental* Personal effects;
- Personal financial information, credit reports, or other financial data;
- GPS records in connection with the electronic toll collection system and digital audio/video recordings of toll collection and safeguarding activities of the Transportation Authority;
- DD Form 214 filed with county clerk, including any form filed before July 1, 2002;
- Personal information of guests of state parks owned and operated by the Tourism and Recreation Department; and
- Certain records of the Department of Public Safety



When a record meets these board definitions, it is open.

An open record may, nonetheless, be shielded from disclosure if a specific exemption or exception applies.

REDACTION

Sometimes the entire record will be exempt, but if redaction is possible, the reasonably segregable portion of a record containing exempt material shall be provided after the exempt portion has been removed.

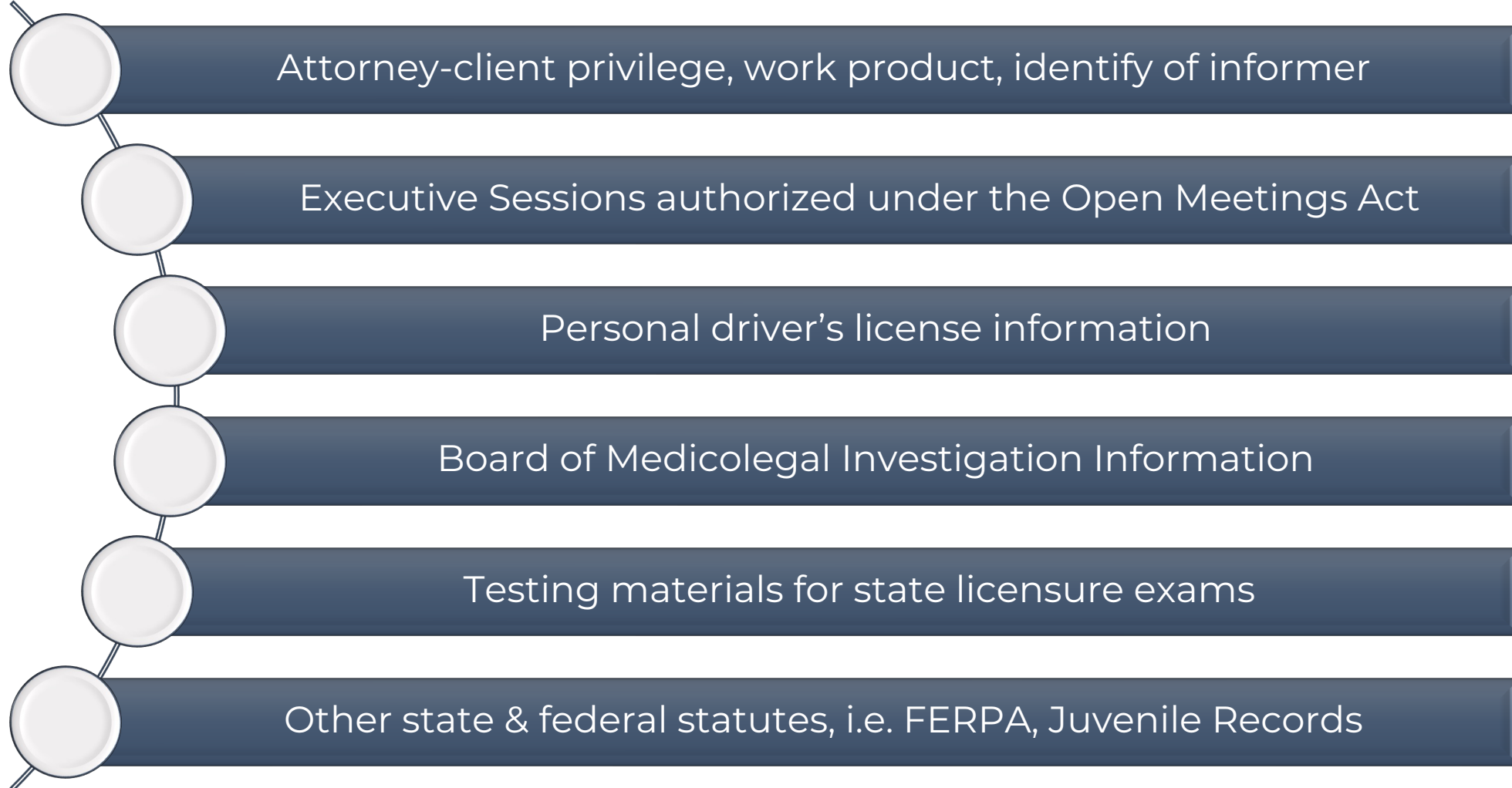


Exemptions



Exemptions to the Open Records Act

51 O.S.2021, § 24A.5



MOST COMMON STATE EVIDENTIARY PRIVILEGES AND THE ORA

The Attorney-Client Privilege generally protects communications made in confidence between privileged persons for the purpose of seeking, obtaining, or providing legal assistance for the client. 12 O.S.2021, §2502(A)(5).

*Note: The attorney-client privilege for public officers or government agencies is more limited than a private client. Government clients only enjoy the privilege when the communication concerns a pending investigation, claim, or action, when disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest. 12 O.S.2021, § 2502(D)(7).

MOST COMMON STATE EVIDENTIARY PRIVILEGES AND THE ORA

The attorney work-product privilege doctrine:

- Ordinary work product prepared in anticipation of litigation or trial = discoverable if required showing under 12 O.S.2021, § 3226(B)(2) made.
- Opinion work product prepared in anticipation of litigation or for trial = not discoverable except in extraordinary circumstances.

Application of this privilege “requires distinguishing between (1) communications and things prepared in anticipation of litigation or for trial by or for another party or by or for the representative of that other party, etc., that may be discoverable and (2) the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, of which a court shall protect against disclosure.” *Scott v. Peterson*, 2005 OK 84, ¶ 8, 126 P.3d 1232, 1235.

MOST COMMON STATE EVIDENTIARY PRIVILEGES AND THE ORA

Identity of the informer privileges:

"Public officials may refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer." 12 O.S.2021, § 2510(A).

An informant's identity will not be shielded from discovery, however, if the informant's identity has been disclosed; the informant is a material witness, a codefendant, or able to give testimony; or believed to be unreliable or not credible. *Id.* § 2510(C).

MOST COMMON STATE EVIDENTIARY PRIVILEGES AND THE ORA

Identity of juveniles are exempt and should be redacted.

By statute, a juvenile is “any person under eighteen (18) years of age” who has neither been convicted of a deferred sentence under the Youthful Offender Act nor certified as an adult. 10A O.S.Supp.2015, § 2-1-103(6). Juvenile Court records “shall not be open to the general public or inspected or their contents disclosed. Id. § 2-6-102.



Exceptions

“The exemptions contained in the Act are not privileges, sheltering information from civil litigation disclosure but rather constitute exceptions to the general requirements for disclosure under the Act.” *J.M. v. Hilldale Indep. Sch. Dist. No. 1-29 of Muskogee Cty.*, No. CIV-07-367-JHP, 2008 WL 1743489, at 1 (E.D. Okla. Apr 15, 2008).



Exceptions

The Act applies, but these records are specifically excluded from disclosure under the ORA.

Certain Law
Enforcement
Records

Litigation Files
& Investigatory
Reports

Personal Notes

Certain
Personnel
Records

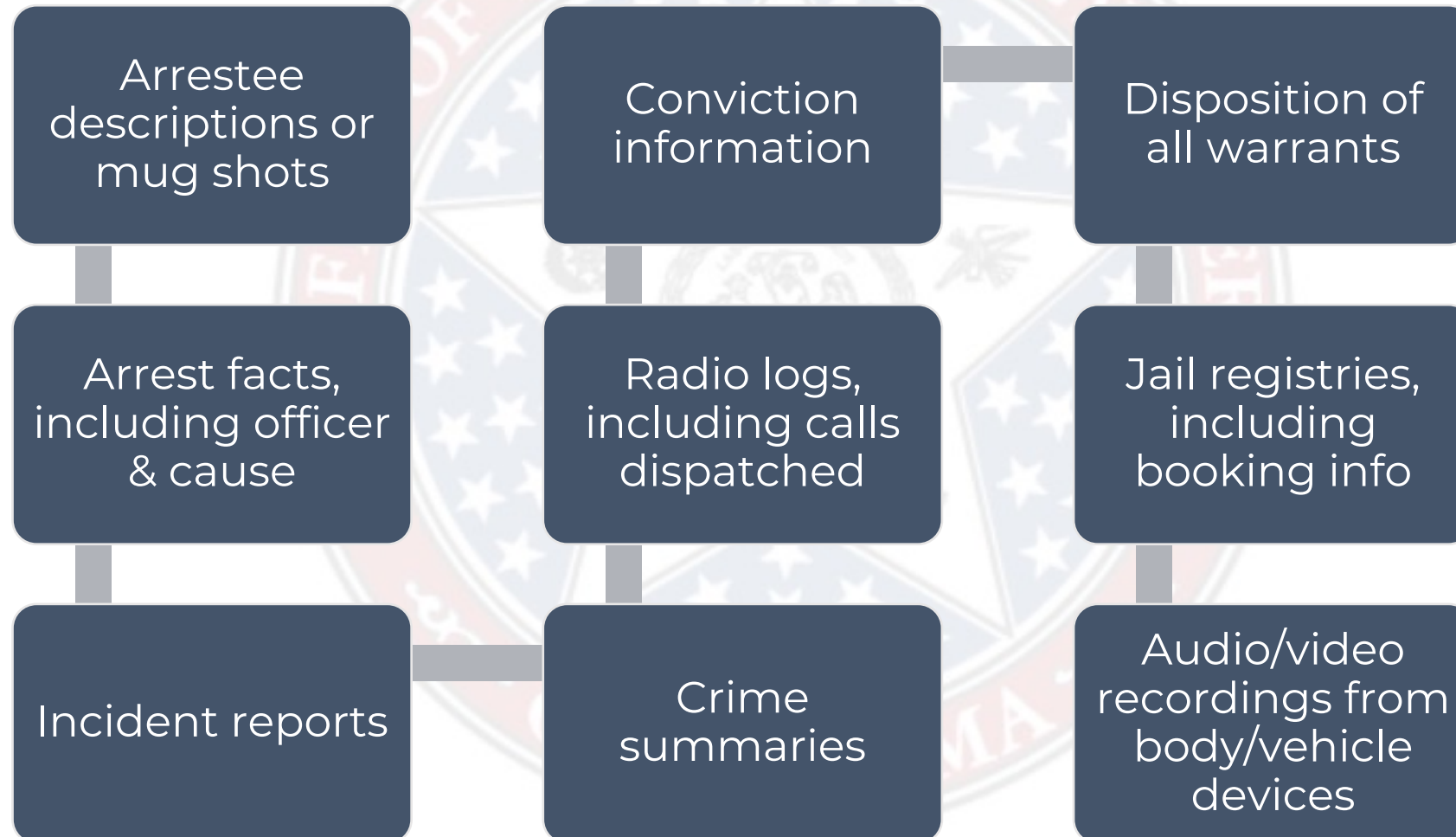
Federal
Records

Information
Related to
Terrorism

Law Enforcement Records

- Law enforcement agencies may deny access to records unless court finds that public interest or the interest of an individual outweighs reason for denial. § 24A.8(B).
- Law enforcement agency cannot deny access to records that it has already previously made public under ORA or otherwise provided by law.

Law Enforcement Records



LAW ENFORCEMENT RECORDS

Generally, unless a law enforcement record is made open by § 24A.8(A) or by another state or local law, access to the record may be denied. 51 O.S. § 24A.8(B).

- **Pleadings** in a criminal case may be kept confidential, until filed with the court clerk (unless sealed or otherwise protected). See, e.g., 22 O.S. § 385.
- **Traffic collision reports** may be withheld for up to 60 days, but the reports shall be made available as soon as practicable upon request to certain individuals (parties involved in the collision and their legal counsel, law enforcement agency, newspaper, radio, television broadcaster, etc.). 47 O.S. § 40-102; Cummings, 1993 OK 36, 849 P.2d 1087.
- **Dash/Body-mounted camera footage** is an OPEN RECORD but may be subject to redaction pursuant to § 24A.8(A)(9) and (10). See *Ward & Lee, P.L.C. v. City of Claremore*, 2014 OK CIV APP, 316 P.3d 225.

CONFIDENTIAL LITIGATION FILES AND INVESTIGATIVE REPORTS

Litigation files and investigatory reports may be kept confidential by–

- Attorney General of the State of Oklahoma,
- Agency attorneys authorized by law,
- Workers' Compensation Commission,
- Office of district attorney of any county, and
- Office of municipal attorney for any municipality



Confidential Litigation Files and Investigative Reports

But see § 24A.20:

“Access to records which, under the Oklahoma Open Records Act, would otherwise be available for public inspection and copying, shall not be denied because a public body or public official is using or has taken possession of such records for investigatory purposes or has placed the records in a litigation or investigation file. However, a law enforcement agency may deny access to a copy of such a record in an investigative file if the record or a true and complete copy thereof is available for public inspection and copying at another public body.”



PERSONNEL RECORDS

Public bodies may keep personnel records confidential in two situations:

1. Internal personnel investigations, except final disciplinary action resulting in some action, *i.e.* termination, loss of pay.
2. Cases when disclosure would warrant an invasion of personal privacy.

PERSONNEL RECORDS

- Public bodies should utilize a balancing test weighing the public's right to know against the employee's right to privacy.
- Protected from disclosure: home addresses, home telephone numbers, Social Security numbers, private email addresses, and private mobile phone numbers of current and former public employees shall not be open to public inspection or disclosure; provided, however, that nothing in this subsection shall be construed to exempt from disclosure public records created using a private email address or private mobile phone.
- Except as may otherwise be confidential by statute, public employees have a right to access their own personnel file.



CONFIDENTIAL PERSONAL NOTES

A public official may keep confidential his or her personal notes and personally created materials **prior to taking action.**

- Prior to making a recommendation
- Prior to issuing a report.

Any research leading to adoption of public policy or implementation of public project does not fall under this exemption.

REMEMBER: Consider disposition schedule; duty to maintain records for a period of time.



VOLUNTARILY SUPPLIED INFORMATION

Any information, records or other material heretofore voluntarily supplied to any state agency, board or commission shall be subject to full disclosure.

*Exception: if disclosure would give an unfair advantage to competitors or bidders in certain situations delineated in Section 24A.10(B).



CONFIDENTIAL FEDERAL RECORDS

To the extent required under federal law, a public body or official may keep confidential records coming into the possession of the public body or official or gather as a result of federal legislation.



EDUCATION RECORDS

Public educational institutions may keep confidential the following–

- Individual student records,
- Teacher lesson plans, tests and other teaching material, and
- Personal communications concerning individual students.
- If the public educational institution accepts federal funding, the Family Educational Rights and Privacy Act will apply.
- Statistical information that is not identifiable to a particular student and directory information shall be open for public inspection and copying, if kept.
- Student (18 years or older) or parent may request institution to request prior consent before release of directory information.

Confidential Information relating to information technology and infrastructure vulnerability

Public body may keep confidential –

- Assessments of the vulnerability of government facilities or public improvements to an act of terrorism and work papers directly related to preparing the assessment of vulnerabilities
- Information technology of a public body or public official but only if the information specifically identifies:
 1. design or functional schematics that demonstrate the relationship or connections between devices or systems,
 2. system configuration information,
 3. security monitoring and response equipment placement and configuration,
 4. specific location or placement of systems, components or devices,
 5. system identification numbers, names, or connecting circuits,
 6. business continuity and disaster planning, or response plans, or
 7. investigative information directly related to security penetrations or denial of services

A FEW MORE EXCEPTIONS TO NOTE

Information relating to terrorism may be kept confidential. 51 O.S.2021, § 24A.28.

A Protective Order withholding material from the public must include: (1) statement from the court, (2) specific identification of material to be withheld, and (3) a Confidential stamp or label. 51 O.S.2021, § 24A.29.

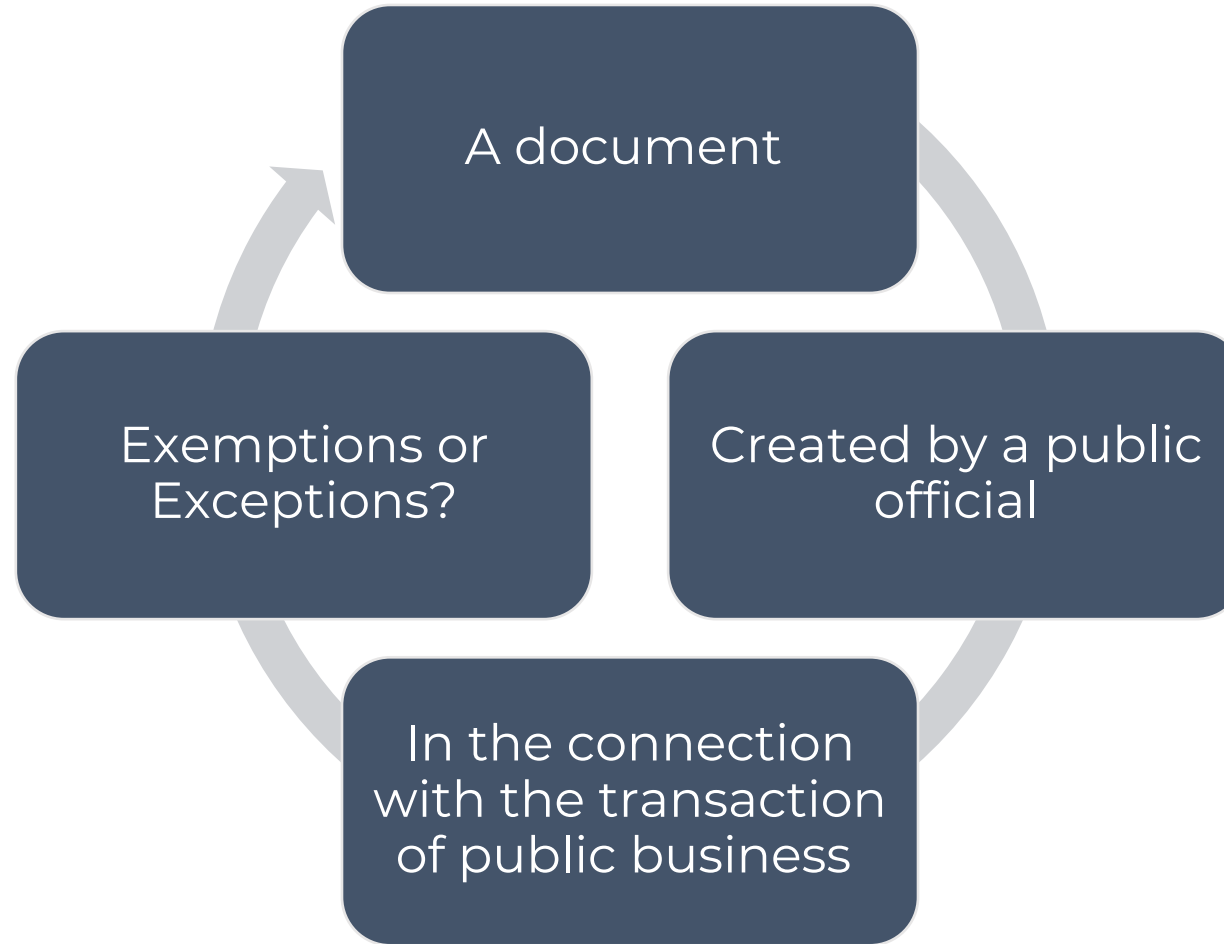
Court records are open, unless the court seals the record or a portion of it. To seal the record, the court must find a “compelling privacy interest exists which outweighs the public’s interest in the record.” The order sealing the record must be public and must make specific findings of fact and conclusions of law. 51 O.S.2021, § 24A.30.

CLEET and the Department of Public Safety shall keep certain law enforcement training records confidential. 51 O.S.2021, § 24A.8.

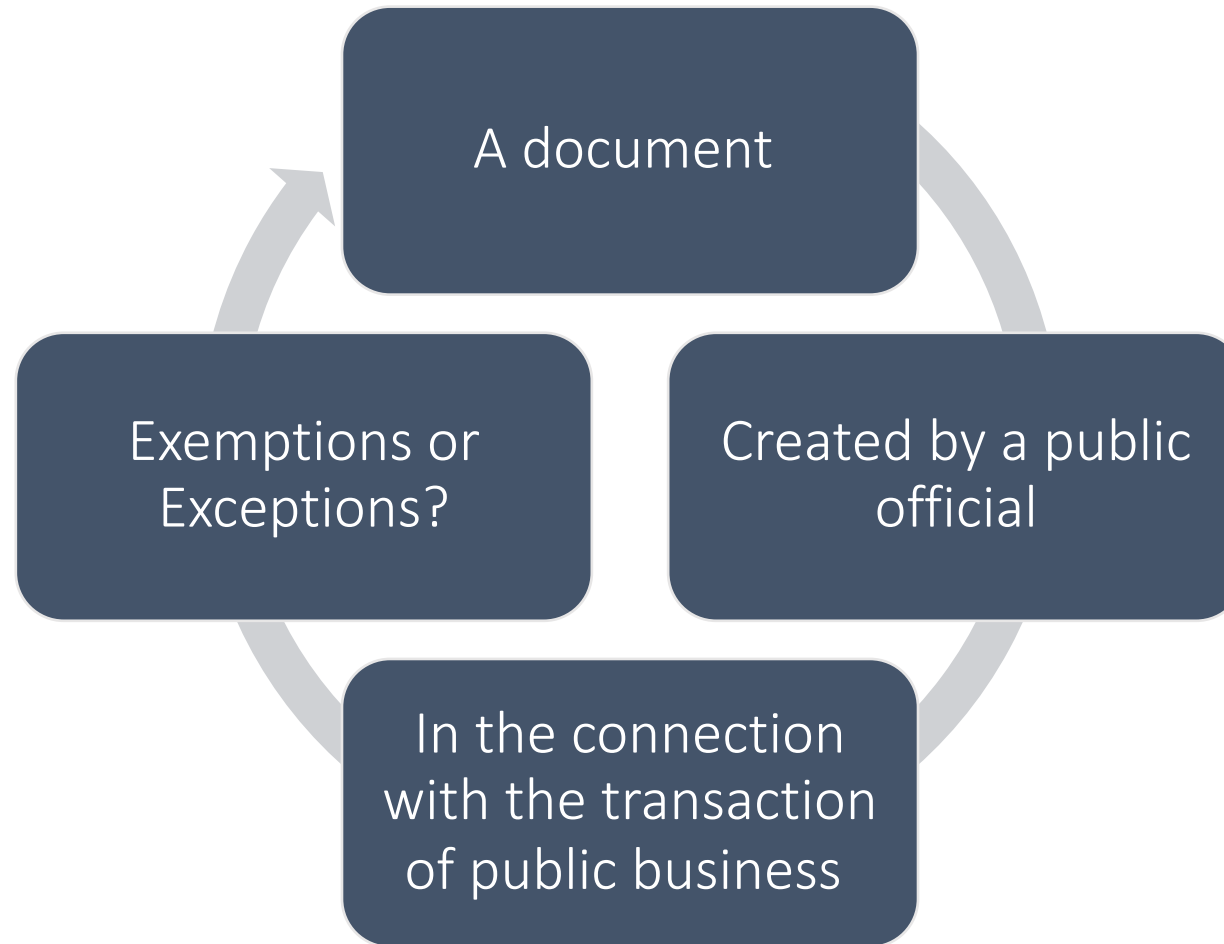
Practical Application



Arrest Records: Are They Open?



DRAFTS OF FILED BRIEFS: ARE THEY OPEN?



PRODUCTION PROCEDURES



Open to any
person

Inspection,
copying,
and/or
mechanical
reproduction

During
regular
business
hours

Not required to
create a record
or format that
does not exist

Disclosure



DISCLOSURE

Reasonable procedures may be implemented to protect the integrity and organization of records and to prevent excessive disruption of essential functions. Section 24A.5(6).

A public body *shall designate certain persons* who are authorized to release records of the public body for inspection, copying, or mechanical reproduction. At least one person shall be available at all times to release records during regular business hours of the public body. Section 24A.5(7).

Special considerations given to public bodies maintaining less than 30 hours of regular business per week. Section 24A.6.

CHARGING FEES

Public body may charge fee only for recovery of the reasonable, direct costs of–

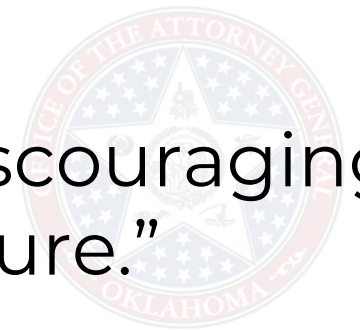
- Copying, or
- Mechanical reproduction (printing).

Fees cannot exceed the following caps–

- \$0.25 for records printed on 8.5" x 14" or smaller, or
- \$1.00 for certified copies of records.
- Fees must be posted at the principal office and be on file with the county clerk for the county in which public body is located.
- Commercial purpose or excessive disruption
- Reasonable fee to cover direct cost of record search and copying (time)

CHARGING FEES: MEDIA EXCEPTION

- Search fees cannot be imposed on news media
- Search fee also cannot be imposed when release of record is in the public interest including, but not limited to, release to news media, scholars, authors and taxpayers to determine those entrusted with affairs of government are honestly, faithfully, and competently performing job duties.
- Fees “shall not be used for purpose of discouraging requests for information or obstacles to disclosure.”



TIMELINE FOR RESPONSES

- Prompt
- Reasonable access
- No FIFO - can't delay a request that can be filled quickly simply because it's behind a request that will take longer



PRODUCTION OF PUBLIC RECORDS

Public body is permitted to establish “reasonable procedures” to–

- Protect integrity and organization of records, and
- Prevent excessive disruptions of its essential functions.

Delay in providing access must have nexus solely to time required for preparation of request documents and avoidance of excessive disruptions to public body’s essential functions.

PRODUCTION OF PUBLIC RECORDS (CONT'D)

- A public body cannot unreasonably delay completion of prior requests that will take substantially longer than a more current request.
- A public body that uploads any records online meets its obligation of providing prompt, reasonable access.



PRODUCTION OF RECORDS AND DUTIES

“Any reasonably segregable portions of a record containing exempt material shall be provided after deletion of the exempt portions.”

Public body must designate certain persons authorized to release records for—

- Inspection,
- Copying, or
- Mechanical reproduction.

At least one (1) employee must be always available to release records during regular business hours.

PRODUCTION OF RECORDS – PUBLIC BODIES OPEN LESS THAN 30 HOURS A WEEK

Public body must post and maintain notice at its principal office and the county clerk where public body is located the following:

- Designate days of week when records are available for inspection, copying, or mechanical reproduction,
- Set forth name, mailing address, and telephone number of employee in charge of records; and
- Describe in detail procedures for obtaining records at least two (2) days of the week, excluding Sunday.

Requestor and public body may agree to a time and date for inspection, copying, or mechanical reproduction outside of the designated time and days described in the written notice.

NO ADDITIONAL RECORDKEEPING REQUIREMENTS

- The ORA does not impose additional recordkeeping requirements on public bodies or public officials.
- If a record does not exist, a public body or public official DOES NOT have a duty to create one to fulfill an ORA request.
- If a public body or public official does create a record, the newly created record must be maintained for subsequent inspection, copying, or mechanical reproduction.

Wagner v. Office of the Sheriff of Custer County

2021 OK CIV APP 20, 492 P.3d 1240

- Out-of-state requestor asked for records from Custer County Sheriff and for the records to be emailed to him.
- Sheriff refused, stating that he would oblige the requestor with right to inspect, copy, or print the records. Requestor insisted on receiving the records by electronic mail.
- Requestor filed suit seeking relief under §24A.17(B).
- The District Court granted Sheriff's motion for summary judgment. On appeal, the Court of Civil Appeals affirmed the District Court. The court held that the ORA only provides for inspection, copying, or mechanical reproduction. Accordingly, Sheriff was under no obligation to email the records to the requestor.

Ross v. City of Owasso

2020 OK CIV APP 66

- City of Owasso allowed former city manager to resign following investigation into misconduct. The city hired outside counsel to conduct the investigation, which resulted in the creation of an investigative report. The report detailed criminal violations and violations of city policy.
- City manager received generous severance package following approval of settlement with Owasso City Counsel. A former councilmember (Ross) objected based on clause in the city manager's contract that stated he forfeited the severance if he was fired for cause.
- City of Owasso denied access to the investigative report to former councilmember, which led to the suit.

Ross v. City of Owasso

2020 OK CIV APP 66

- All claims except disclosure of report were settled. However, district court granted City of Owasso summary judgment on the issue, which gave rise to the appeal.
- On appeal, Ross I determined that report was a personnel record and that disclosure was neither mandatory nor prohibited. Case was remanded to determine whether City abused its discretion by refusing to release report and to allow Council to make determination. Council determined the report was confidential. This determination gave rise to this appeal.
- The Court found that the report was not confidential as a matter of law and remanded the case, ordering the City to release the report.

Ross v. City of Owasso

2020 OK CIV APP 66

- 51 O.S.2021, § 24A.7(A)(1) is permissive, not required.
- City did not show any public or governmental interest in withholding the report.
- Requestor was not motivated by mere curiosity or generalized desire to broadly monitor workings of government. The report was requested to investigate misconduct of a high-ranking official, not an employee of the City.
- Raise important questions about why city manager was resigning and receiving severance despite facing allegations of misconduct and instead of being fired.
- The court called it a “core” ORA matter going to legitimacy of Mayor and City Council’s good governance and use of public funds.

State ex rel. Okla. State Bd. of Medical Licensure and Supervision v. Rivero

2021 OK 31, 489 P.3d 36

- During disciplinary proceedings, parties agreed to a stipulated protective order that kept pleadings filed in the proceedings, whether filed under seal or public, from being used in another proceeding.
- On appeal, the Supreme Court held that public bodies (or parties in litigation) cannot enter protective orders that violate the expressed public policy in the Open Records Act and Discovery Code. If the order violates either the ORA or the Discovery Code, the protective order is overly broad in its application and is void as a matter of law.

CIVIL PENALTIES

Requestor must be denied access to records of public body or public official

- May bring civil suit for declarative or injunctive relief, but suit is limited to records requested and denied prior to time of filing.
- If successful, requestor is entitled to reasonable attorney fees.
- If public body successfully defends suit and court finds that the suit was “clearly frivolous,” public body or official shall be entitled to reasonable attorney fees.
- Public body or official shall not be liable civilly for damages for providing access to records as allowed under the ORA.

CRIMINAL PENALTIES

Public official who willfully violates any provision of the ORA, upon conviction, is guilty of a misdemeanor and shall be punished by–

- Fine not exceeding \$500
- Imprisonment in the county jail for up to one (1) year, or
- Both





THANK YOU!

Please visit OAG's website for a copy of this presentation:

<https://www.oag.ok.gov/transparency-state-government>